IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	No. 18 C 864
	)	
DEALER MANAGEMENT SYSTEMS ANTITRUST LITIGATION,	)	Chicago, Illinois
	)	June 10, 2019
	)	9:35 A.M.

TRANSCRIPT OF PROCEEDINGS - Status and Motions
BEFORE THE HONORABLE JEFFREY T. GILBERT, Magistrate Judge

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(Appearing telephonically)

(Proceedings had in open court.)

THE COURT: Sorry, everybody.

I know Ms. Gulley is on the phone too, so we will get everybody's appearances. Just give me one second.

Okay. We'll call the case and get the appearances and started rolling here.

THE CLERK: 18 C 864, In Re Dealer Management Systems Antitrust Litigation, for status and motion hearing.

THE COURT: Okay. Good morning. Plaintiffs first and then defendants.

MS. WEDGWORTH: Good morning, your Honor. On behalf of dealership class plaintiffs, Peggy Wedgworth for Miller Tadler Phillips Grossman.

MR. HO: Good morning, your Honor. Derek Ho from Kellogg Hansen on behalf of the individual and vendor class plaintiffs.

MR. NEMELKA: Good morning, your Honor. Mike Nemelka from Kellogg, Hansen on behalf of the individual and vendor class.

MR. RICHTER: Good morning, your Honor. Frank Richter, from Robbins Geller, dealership class plaintiffs steering committee.

THE COURT: Dealership class plaintiffs steering committee.

And how is that different than Ms. Wedgworth?

MS. RICHTER: Ms. Wedgworth is lead counsel for the dealership class.

THE COURT: Okay. Back row.

MR. MacDONALD: Good morning, your Honor. Ross MacDonald of Gibbs & Bruns for defendants Reynolds and Reynolds Company.

MR. ROSS: Good morning, your Honor. Brian Ross also from Gibbs & Bruns on behalf of the Reynolds and Reynolds Company.

MS. MILLER: Good morning, your Honor. Britt Miller, Mayer Brown LLP, on behalf of CDK Global, LLC, and Computerized Vehicle Registration.

MR. PROVANCE: Good morning, your Honor. Matt Provance also with Mayer Brown for CDK Global and Computerized Vehicle Registration.

THE COURT: And on the phone we have?

MS. GULLEY: Good morning, your Honor. This will be Andi Gulley for the Reynolds and Reynolds Company.

THE COURT: Thank you.

I'm sorry, Ms. Gulley, that we couldn't rearrange this. When you guys asked to rearrange it, I actually had a trial scheduled for the 17th, 18th, and 19th, which precluded me from moving this there, and so I just didn't want to -- I didn't want to have to push it farther into June.

And then last week that case settled. So I'm sorry.

But we since we already had this, and since you had said you were okay to appear by phone -- I don't know what you're doing, I hope I'm not interfering with your vacation, but whatever, I thought for a variety of reasons we ought to go forward with this as planned. So thanks for appearing by phone.

It sounds like you're on a landline also. Are you?

MS. GULLEY: Yes, I found some temporary office. No problem. Thanks for letting me attend this way.

THE COURT: Okay. Great.

Okay. I know we have a lot of things pending. My intention today, frankly, is to go through and rule on as much as I can.

At the end of doing that, it is possible that all we will have under advisement is motions that require some in camera review, which we'll have to talk about.

So I don't have a particular order here, but I think I'm happy to deal first with this joint motion, ECF 699. It is a joint motion by the -- CDK and the dealership class plaintiffs to allow some late-served discovery subpoenas to go forward, because both sides agree that they should be able to do that.

Authenticom, the vendor class, and Cox, as well as some other folks who were included with that group, who I don't need to always name, indicated some opposition to this. So I

issued -- I did issue an order that said, I think, you know, I didn't see how this would delay the progress of the case.

But as I thought about it more, either Mr. Nemelka or Mr. Ho, whoever is going to address this -- oh, I did start to think, you know, when is enough enough? And I -- I thought I could see some principal distinctions here.

But, anyway, don't you -- somebody tell me what your opposition is here.

MR. NEMELKA: Thank you, your Honor. Mike Nemelka. I'll be speaking on behalf of our clients.

It is pretty simple. It is actually that principle that at some point discovery has to end. And these are late-served subpoenas. And Infutor, in particular, has lodged what we feel are meritorious objections on timeliness. And so we don't take a position on the subpoenas that the dealers want to serve to the telecom companies, which is why we, you know, can join the motion. But our basis is pretty simple, that, you know, at some point this needs to come to an end.

THE COURT: Why don't you oppose the AT&T -- the telephone carrier subpoenas? Because nobody objects to them, and it is just a -- it is just pushing paper back and forth.

MR. NEMELKA: Right. The telecom companies haven't objected on timeliness yet, unlike Infutor. And also they just -- these are routine subpoenas that the telecom companies respond to in the thousands every year that it is -- they have

offices set up to do this. It is basic simple records that they have available, much different from a -- the type of subpoena that was issued to Infutor.

THE COURT: Okay. Who is going to speak to this from the prospective of the defendants?

And before you speak, I have to say that I have changed my mind a little bit on this. I mean, I -- you know, I know that Impact Group has produced. Infutor Data Solutions has objected. I know that the subpoenas to the phone carriers are more administrative, ministerial than the other ones. But I have to tell you what my leaning is after thinking about this so that you know what you are dealing with. I'm thinking about denying the joint motion entirely, without the agreement of all parties. I'm -- you know, if -- including the telephone carrier subpoenas. Those haven't been served yet. There is a motion late to file them. You guys served your subpoenas on the last day of discovery. That's usually not the way it is done.

And given what I see in this case and the continuing attempts to expand scope in some ways, a large part of me feels, you know what, you're -- you got to wind this up. I keep hearing from Authenticom that, you know, there are -- it is being delayed, we're pushing things out too long. And while I don't know how this particularly will push things out too long, no doubt based on what I see in front of me, at least

Infutor, I'm going to have to deal with objections from a third party, so that will delay what you are doing. Potentially somebody gets the document and says, ah-ha, they found something that I didn't know before, and now I want to reopen somebody's dep. I don't know that I should be countenancing any of that.

So, you know, your subpoenas were served on April 30th. Discovery closed on that date. Without disagreement of the dealership class plaintiff, you wouldn't be able to serve those. And without your agreement, the dealership class wouldn't be permitted to serve these additional subpoenas.

What happened there, did we drop her?

THE CLERK: Ms. Gulley?

MS. GULLEY: Yes. Good morning. Thank you.

THE COURT: Okay. Just -- you know what, I'm going to give you Brenda's email right now because --

THE CLERK: She has it.

THE COURT: She has it?

Okay. Because we have been having problems for weeks, months, with our AT&T connection here. So if we drop you, you need to let Brenda know, and we'll get you back on. Okay?

MS. GULLEY: I have got her email.

THE COURT: Okay.

Yeah, so that's my feeling. Mr. Ross, you can wade in to that now. But -- I don't know, I'm just thinking, let's

move this thing forward so you can get to summary judgment, trial, settlement, anything else, appeal.

Go ahead. I want to tell you what I was thinking just so that you had -- you weren't -- you knew what I was thinking.

MR. PROVANCE: Thank you, your Honor. This is Matt Provance.

THE COURT: Oh, you're doing it. Okay. Fine.

MR. PROVANCE: Yes. Thank you for sharing your views on the matter. That's helpful and informs our thinking.

One point I would like to make is that we did serve a subpoena to Infutor. It is towards the end of discovery. It is based on information that in our view we learned very late in the discovery process. And that was the main motivation for the timing of our subpoena.

Our main interest here is simply that the discovery be a two-way street. That it go both ways. At the last status hearing Mr. Nemelka, I believe, stated on the record that he was very interested in the AT&T and carrier subpoenas going forward, although he couldn't join them formally.

To the extent he is taking an opposite position now, I think that that's somewhat inconsistent.

But the plaintiffs have identified some limited discovery that they would like to take from the carriers. We have identified, in our view, limited and targeted discovery that we would like to take from a third-party, Infutor.

Now if your Honor is of the view that there needs to be a cutoff and the cutoff has taken place and we need to move forward, the defendants are prepared to accept that. We would just ask that that rule be applied evenly to both sides, which it appears that your Honor is inclined to do.

THE COURT: Well, I would apply it evenly to the both sides in the context of joint motion ECF 699. This thread runs through some of the other motions that are pending and that I am going to have to deal with or will deal with today. And, you know, sometimes it bites one way or sometimes the other -- it bites the other.

But my ruling on ECF 699, which is this joint motion, is -- and I will say, Mr. Provance, that I'm not such an ogre that if -- and, you know, I don't -- I only see things at a particular level. I don't see things always at a granular level, unless you bring me to the granular level. So if all parties here, including Authenticom, Cox, Auto Loop, and that whole group, end up saying to you, I dropped my objection, I'm okay with you going through that one because I really want to see these AT&T subpoenas because I do agree -- I don't know if he changed his position or not. And, you know, changes in position -- I know in this litigation everybody accuses everybody else of changing their positions. But I don't necessarily see a principal distinction that Mr. Nemelka is relying on.

Yes, I understand the AT&T stuff is easier to produce and deal with, because we're not going to get a motion to quash from them, than the Infutor stuff is, so I get there is a distinction there potentially. But I look at this more as a tactical position. We don't object to the dealership class plaintiffs because we don't really want to aggravate our co-plaintiffs any more than we need to aggravate them. But we do object to the defendants because we don't care about aggravating the defendants.

But if everybody says, you know what, this stuff is -- if Authenticom, Cox, et al., decide, you know what, I'm willing to drop my principle here, quote unquote, and agree to your subpoena going forward, defendants, so that we could get the AT&T, Verizon, and Sprint stuff, because I think that's really valuable too, I'm not going to block it. If you, both of you, decide to go forward, you're agreeing to do it, fine. I'm hoping that doesn't spawn continued litigation. But if you guys are agreeing to it, I'll go with it.

But absent agreement of the parties on all fronts with respect to the joint motion, I'm going to deny that motion.

MS. RICHTER: Your Honor, may I get some clarification on that?

THE COURT: Yeah.

MR. RICHTER: Frank Richter.

THE COURT: Yes.

MS. RICHTER: So this agreement kind of came about because we had briefing for the wireless subpoenas due. We had arguments we believe good cause existed for extension of the fact discovery. And defendants then responded that they had good cause for their subpoenas as well. And that was the result of the joint agreement.

You don't want to hear any argument as far as good cause or briefing any further is the way we should understand this order.

THE COURT: Okay. I have a visceral reaction to that, but I want to cage my visceral reaction and consult here for a second.

(Brief interruption.)

THE COURT: Here's my ruling. Okay? My visceral ruling was, heck no. Okay? My visceral ruling was you are stuck with this because you agreed to go forward with this joint motion.

However, I realize that you tried to tie my hands by saying that this was an all-or-nothing agreement, Judge, so you got to accept our agreement or not. Okay?

You want to knock yourself out -- I mean, I will tell you -- when did you seek leave --

MR. RICHTER: I'm not requesting further briefing --

THE COURT: Well, then why did you --

MR. RICHTER: -- your Honor.

THE COURT: -- are you raising the issue?

MR. RICHTER: I just want to make sure --

THE COURT: Just because you like to dot Is and cross Ts?

MS. RICHTER: Your Honor, just so we have clarification for the parties, they say, well, we still want -- you know, defendants say, well, we would still like to brief it. We have an answer to that --

THE COURT: Okay. Here's my --

MR. RICHTER: -- and that way we don't have any confusion that's we're -- we're good to go, let's not -- let's close the book on this, and we're done. That's all I'm asking.

THE COURT: Here's my response to your theoretical question. I'm ruling on 699. It was a joint motion. Okay? I recognize the joint motion said, this was an all-or-nothing deal, Judge. We want to tie your hands on this. I'm denying that motion, even though it was a joint motion because it is opposed by the -- one class of plaintiffs.

If that now brings a motion for leave to serve these subpoenas at a briefing schedule, you know, I'll decide that, if, as, and when it is briefed. And hopefully that's this year. But -- and I say that facetiously. Okay? But I'm not going to rule on -- I'm not going elsewhere.

You need a briefing schedule on it? Then file your motion for leave -- do you have -- no, you don't even have the

motion for leave. File it. Give me a briefing schedule. If they want to brief the Infutor, knock your socks off. I'm just ruling on the joint motion that is in front of me now, and I'm doing it.

MR. RICHTER: Understood, your Honor. Thank you.

THE COURT: Understood?

MR. RICHTER: Yep.

THE COURT: Need any more clarification on that?

MS. RICHTER: Absolutely not.

THE COURT: Good. Okay.

Next issue, motion that has been pending for a bit of time, plaintiffs's motion to compel production of documents on CDK's privilege log. I think this is -- I don't even know what the number of the motion -- I probably do. Hold on. I think it is ECF 535.

Four issues here. Emails to a large number of recipients; emails to distribution lists where the list does not identify everyone who received the email; communications to third-party advisors, consultants, and agents. I don't know how many -- I might have said three issues. There is five issues.

Advice that is predominantly not legal in nature; and implicit waiver. Okay?

Here's my rulings on these. Subject -- Topics 1 and 2 overlap, right? Emails to a large number of recipients and

emails to distribution lists where the list does not identify everyone who received the email.

As to both categories I agree with plaintiffs that CDK has not met its burden of establishing privilege with respect to all the recipients who received these emails.

With respect to the first category, the large number of recipients, it seems that defendants can identify who received the emails, but there is nothing in the briefing to indicate why all those people are within the attorney-client privilege.

With respect to the second group of emails, to the distribution list, CDK can't even identify the recipients for some of these lists. I disagree with CDK that plaintiffs are going back on some type of agreement that they reached or reneging on some type of agreement that they reached to accept these distribution lists because plaintiffs say, and I don't say anything in the record to contradict this, that at the time they were talking about that agreement, they did not know and didn't -- hadn't discussed with the defendants that CDK could not identify even the people who were -- to whom the email was directed as part of a distribution list.

It is CDK's burden to show privilege. It has not shown privilege as to either group of email. Again, because the first one, they haven't told me why all those people are within the privilege. And, parenthetically, the more

people -- there is no -- CDK is right, there is no per se rule that says, five people can be in a distribution list for a privileged communication, but eight can't. Or 20 can, but 25 can't.

But I don't even have a threshold showing by CDK that the people to whom the emails in the first group are directed are covered by the privilege.

And in the second, if you can't even identify who the email went to, then you're not going to be able to identify privilege.

So I'll grant the motion with respect to both those categories of emails.

With respect to the next two categories, communications to third-party advisors, consultants, and agents, and advice that is predominantly not legal in nature, I need more information. These were briefed at a pretty high level. All I have is the privilege log really. I don't have the documents.

And so in order for -- and I think that's true. Correct, CDK?

MR. PROVANCE: Yes, your Honor, that's correct. We have not submitted those in camera.

THE COURT: So that's always a painful process. I'm not going to spare you the pain of that process. If I have to go through each of these documents document by document,

instead I would convene a hearing in which I would go through each document and see whether or not in all or in part the document really is or is not something that fits within the privilege.

My guess is that that will be a painful process, and that all the documents will not fit within that category because -- or all parts of a document won't fit within that category because I just -- that's just my experience.

But the issue was addressed at a 10,000-foot level, not on a -- you know, I agree with the plaintiffs that if the -- I mean, I agree with both parties here. Third-party advisors, such as are identified in these briefs, can be within the privilege if a communication that includes them is necessary for the lawyers to provide the advice.

If it is not, and he can't make that case, then they are not within the privilege.

I also agree that communications that are not predominantly legal in nature, or stated another way, if it is not an attorney-client communication within the law, then it is not going to be protected.

So if I have to decide this issue, I'm going to set a hearing on it. And you guys are going to come in, and we'll spend as much time as necessary going through document by document. I do want CDK to submit to me in camera ASAP the documents that are subject to this.

Does anybody have a -- I mean, I know I have read your brief, but is this ten documents? 50? 150? 2000?

CDK, how many are we talking about here?

MR. PROVANCE: Your Honor, unfortunately, I don't have the list in front of me, but I think it is probably in the range of hundreds. As you know, CDK produced a lot of documents in this case and as a result our privilege log contains a lot of entries.

THE COURT: Okay. Is there any benefit for me -- I mean, I'm not going to decide -- I can't decide this on the papers because I don't know what the documents say. I mean, on a broad basis, I agree that, you know, plaintiffs said, I don't see how they are privileged, but all I have seen is a privilege log.

From CDK's basis, from what you say, I could say, yeah, I could see how some of this stuff is privileged. Is it all? I mean, before you submit this to me in camera, you want to go through these documents and redact what is actually something that is privileged versus are you available for squash on Saturday afternoon?

I mean, you know, this -- did you produce in a redacted way or did you just claim privilege on the entire document?

MR. PROVANCE: Some of the documents at issue are redacted. Some of the documents at issue were withheld

entirely.

THE COURT: Okay. So for the one -- so you -- I guess what you are telling me is -- I am interpreting what you are telling me as you have already gone through the exercise to be more scalpel-like in your invocation of privilege and not macro, and so I need to look at these things and set a hearing. Right?

MR. PROVANCE: If I am interpreting your comments, your Honor, I believe that's the way forward.

THE COURT: Okay.

MR. PROVANCE: If your Honor would like some sample of the documents at issue --

THE COURT: Sample is not going to do it, right? Because it is -- this determination has to be made on a document-by-document basis. I don't see any way that -- I mean, if this was a class certification motion in a TCPA case, I could look at samples, but it is not.

I don't know how I am going to make an up or down call on a document-by-document basis without seeing the documents.

MR. PROVANCE: Understood.

THE COURT: So I'd like you to -- you don't have to say right now, but at least by the conclusion of the hearing tell me when you're going to submit those documents in camera. We could talk about when I'm going to have a hearing on this. Okay?

MR. PROVANCE: Your Honor, I had a few points of clarification, but I'm happy to wait until you have finished your ruling.

THE COURT: Okay. There is just one more thing. I don't buy plaintiffs's implicit waiver argument. That is a complete belier of an argument. It does not work. I address the issue of when a party puts advice of counsel in issue very recently in a case called Derek versus Roche Diagnostics. It is reported at 2019 Westlaw 1789883. Some of the reasoning and language in that opinion is equally applicable here.

Plaintiffs's argument is just completely out to lunch. I mean, the page 12 of the motion -- or the memorandum in support of the motion says, quote, by relying on the text of the agreements, these particular agreements you're looking at -- you're talking about, which were drafted by counsel for the -- for their defense, defendants have put the intent of those agreements at issue.

That just makes no sense. I mean, that's a flyer argument. You devote about a little over a page to it if you look at all of it. There is no indication CDK is going to rely on communications with counsel in support of its defense relying, or at least in the briefs, with respect to this stuff.

I know you cite case law. And I know the case law exists that part of the privilege and waiver issue is based on fairness. I don't see any unfairness here.

And I don't think that by relying on the text of the agreements that are drafted by counsel, which is the case in every sophisticated business litigation, CDK has put the advice of counsel defense at issue or its communications with counsel.

You guys, while I was speaking at the plaintiffs's side, Ms. Wedgworth, Mr. Ho, and Mr. Nemelka were whispering. So what do you have to say on that? Am I misperceiving something?

MS. WEDGWORTH: Your Honor, it is just in one of the depositions there -- well, maybe more than one actually -- there has been testimony that may cause that actually to come -- be an issue in this case. I appreciate your ruling. And given what you said -- and I want to look at this case -- but we do have factual testimony where witnesses think one thing went in the agreement, and then it is understood that because of attorneys something else went in the agreement.

So it may be a factual issue in this case. And I want to review this particular case you have referenced in regard to the testimony we have in this case.

THE COURT: But none of that was in the briefing that I reviewed, right.

MS. WEDGWORTH: It had not happened at the time.

MR. NEMELKA: Correct.

THE COURT: Yeah, okay.

MS. WEDGWORTH: The briefing predated it. We were --

we thought that might be the case when we briefed this. We didn't have the testimony at the time. We now do.

THE COURT: Okay. So listening to what you said in some way critically, I would say I still -- from what you told me, it didn't get me over the hump. You know, there has to -- the fact that a corporate party spoke to a lawyer about what was going to go in or not in the agreement, and this -- and this case -- and I recognize that there is a lot of law in this area, and some of it is not as clear as you would like it to be. But I don't know that that gets you the documents unless and until we hear that the party relying on the privilege is going to somehow put in issue those discussions.

So it is not a -- it is not necessarily a sword that says, well, because lawyers were involved in the drafting, and on advice of counsel, something did or did not go into the agreement, therefore we get the entire agreement. It might be that you need more than that.

But, again, based on what I have seen, at least as the issue has been presented to me now, I'm going to deny the motion with respect to that.

So I'm happy to hear from Mr. Provance. I'm granting it on the first two categories on emails.

I'm holding it -- it remains under advisement with respect to communications to third-party advisors, consultants, and agents, and advice that is predominantly not legal in

nature pending submission of the relevant documents in camera and a hearing at which the Court can address those documents with the parties. And it is denied as to the implicit waiver argument.

Mr. Provance.

MR. PROVANCE: Thank you, your Honor.

If I understand your ruling on the fifth issue, implicit waiver, it sounds like you have ruled, so I will just move on. I was otherwise going to address some of the things Ms. Wedgworth said, but I'm happy to just move on.

The next point I wanted to raise, I think you have just clarified, which was whether your Honor wanted in camera submission on both Categories 3, the third-party communications; and, Category 4, the communications that are putatively business in nature.

I believe you have just clarified that, and we'll get those to you --

THE COURT: Right.

MR. PROVANCE: -- in short order.

On the second issue, your Honor, I just wanted to make one point and clarify, if needed. This is the issue regarding distribution lists. And the one thing -- factual nature I wanted to point out is that all that was at issue on that part of plaintiffs's motion were certain distribution lists, that at the time documents were collected and reviewed, no longer

existed. They're defunct. And that was the reason that defendants were not able, at least with using the tools that were normally available to them in the ordinary course of business, able to determine who was on those now defunct distribution lists.

And the plaintiffs had the same problem with some of their distribution lists. So the agreement the parties made was that for just those distribution lists that are now defunct, they would not need to identify all of the recipients that were on those lists. It is a much different story for distribution lists that still exist, we can look at them and provide that information. And, in fact, the defendants have.

So if your Honor is inclined to grant their motion and require defendants to produce any communications involving now defunct distribution lists, that issue is present on the other side as well. So we would ask in fairness, if that's the way your Honor wants to rule, that you would order the plaintiffs to do the same thing.

THE COURT: I'm not going to do that because I don't have that in front of me. But that would be my same ruling. If I have a situation in which an email is sent to a distribution list and the -- and the custodian of that email says it is privileged, and that party cannot identify to whom the email went, my ruling is going to apply equally to plaintiffs and to defendants.

So if you can't work this out with my ruling -- my ruling necessarily would require plaintiffs to produce any emails that they have claimed as privileged that fall within this kind of a category, unless there is some distinction that actually is meaningful, as opposed to just a distinction -- being a distinction without a difference, you know, as an -- so I'm not going to rule on that now, Mr. Provance. But you can get me in short order if they won't agree.

This strikes me as one of those mutually assured destruction kind of issues which, you know, what's good for the goose is good for the gander on the plaintiffs's side. And if you are sitting on protecting things that are in the same category that you're talking the other side should produce, and I buy your argument, which I do, then you got to be prepared to produce yourself too. And you say they didn't ask for them yet. Okay. Now they are going to ask for them.

And so you can either go one of two directions. You can say, we want all your emails protected under this category, and we'll produce to you all of ours. Or you could say, never mind. Now that the Judge says -- as one of my arguments that I spent some pages on, I really don't like the impact of my argument on what I'm going to have to produce, and I'm in a never mind zone.

To me, if you do that, that was a waste of time. It was a waste of my time, and it was a waste of your time. But

I'll deal with whatever I deal with in the next go-around here. But I will tell you that I will attempt to rule the same when the same facts are in front of me provided there are no differences that I think are material to a ruling.

So we still need -- and I'll just kind of flag here that somebody should remind me -- a date for submission. And I would have to set a hearing date, which I'm not sure I'm completely prepared to do now.

But that's where we are on the motion to compel documents off the privilege log.

I think that brings me to the issue that everybody briefed, that motion to compel versus Authenticom.

No, I can quickly go to CDK's motion for a protective order concerning plaintiffs's interrogatories on the counterclaims, which is ECF 597. I'm going to deny that motion for a protective order and allow plaintiffs's interrogatories on the counterclaims to go forward.

I agree with plaintiffs that given the way the case schedule was put together in this case, and given the pendency of the motion to dismiss the counterclaims during the period of time where discovery was proceeding, that plaintiffs would be prejudiced unfairly if after their motion to dismiss the counterclaims was denied, they are denied the opportunity to proceed with written discovery on the counterclaims.

Those interrogatories, as far as I can tell, were

served within the discovery time period. And had they been responded to would have -- they were served in time for them to be responded to within the existing discovery time period, which as per Judge St. Eve's statement, I think, was not technically including the counterclaim discovery.

I disagree, in case this is the next question, that CDK can now serve discovery after the close of discovery on the counterclaims that it didn't serve before. CDK made a calculated decision to oppose the discovery that the plaintiffs serve the written discovery without serving their own as a, what's good for the goose, good for the gander kind of move. But, again, consistent with my attempting to get this done, I'm going to deny CDK's motion.

Plaintiffs can serve the interrogatories that they served -- CD -- I am going -- if CDK asks me, now let me do that, I'm going to say, no, because it wasn't served in time during the discovery process, even in a protective way.

And one thing I needed to look at here was whether there was any -- were there any particular interrog- -- so, I mean, I noticed in the briefing here, and I'm not trying to override this, for example, that counterdefendants offered to completely withdraw Interrogatories Numbers 17 and 18 and offered to accept summary responses to the interrogatories which called for CDK to identify numerous instances of certain events or conduct.

I mean, I'm not trying to override that. You know, if plaintiffs are still willing to say, we will withdraw these and accept something else, I'm not saying now my ruling supersedes that.

But what I am -- I'm just ruling on the timeliness issue here, primarily, and whether plaintiffs could go forward with this. I do note in reading other motions that you have pending, that there -- discovery has been going forward on the counterclaims. I mean, CDK has been taking copious -- probably the wrong word -- extensive discovery maybe on Authenticom about its access to defendants's -- and so has Reynolds -- the defendants's systems. So, you know, oral discovery has been going forward on this. But, you know, and this motion has been pending since April, but it was probably fully briefed, I don't know, in -- some time in May.

End of April. Yeah, the last day of April or the 29th of April. So it hasn't been sitting there for too long.

But, anyway, whatever you want to do to make it easier on CDK, I'm not saying don't do. And whatever you referenced in your briefs, I'm saying not do.

But in terms the of up or down as to whether or not you can -- you are allowed within the interstices of discovery scheduling to serve these when you served them, I'm siding with plaintiffs on that versus CDK and denying the protective order.

Clarification on that?

MS. MILLER: Your Honor, Britt Miller on behalf of CDK. Two quick questions. One, obviously we did not prepare responses pending the resolution of this motion. So we'd ask for 21 days to respond to the interrogatories in question.

And, two, I assume from the tenor of your ruling that the ones that have been served are it. There is no additional ones that are coming. There is no follow-up additional interrogatories after they get whatever responses. Certainly we'll engage whatever meet and confer process may be necessary as to the responses that we serve. And if there is motion practice on that, we'll certainly engage in it. But to the extent that these are permitted to go forward, these are it.

THE COURT: Yes. These are it. And 21 days is fine.

MS. MILLER: Thank you.

THE COURT: It, with the qualification that you said, that if you object to something and then you meet and confer and then I have to deal with it, in the never ending discovery dispute process here, I'll do it. But I'm not saying they can serve more or you could serve, I guess, any.

MS. MILLER: Understood, your Honor.

THE COURT: Okay. That brings me to the issues that you briefed on an expedited basis. I will say, Mr. MacDonald, I very much appreciate the email exchange that you had with Mr. Nemelka in which you remind -- when Mr. Nemelka expressed a desire to get this briefed in time for our June 10th. You sent

an email saying, you know, Judge Gilbert has said he would like to have at least a week to look at things. And I didn't know about that because the email that came to my courtroom deputy had a proposed briefing schedule of June 5 and June 7, which was plaintiffs's proposed briefing on this.

But I do appreciate at least your consideration of saying, you know, maybe he should have a week to look at this stuff, which he's asked for, in the give and take before filing of the -- this motion. That kind of went by the wayside in some way. But I do appreciate it.

And luckily for Mr. Nemelka, I didn't actually go into the ECF system -- I forgot the briefs here, so I had to print them at all home. And I didn't see that you actually didn't even file on June 7th, you actually filed on Saturday, June 8th. But that was okay because I was able to read it yesterday. Okay?

I want to tell everybody here though -- and you can tell that I have a little bit of an edge here, and I'm sorry about it. Okay? I don't like the fact that I have so many -- I have had so many motions under advisement, which is why I'm trying to rule on as much as I can from the bench.

I do have an impression here that there are fights here that don't need to be had. I have had that impression from the very beginning. And I have had the -- I also have the impression, you know, that sometimes positions are taken for

tactical reasons without fully thinking through the impact of those positions on your own positions. As an example, I'll talk about these email distribution lists which I talked about before.

So, you know, those types of things, just in my mind, increase the stress and tension in your litigation, increase the stress and tension on the Court, but that shouldn't really be your concern.

But I do generally like to have more than a weekend to think about something. The reason that I said I adopted your briefing schedule and also went forward here is I do agree you're entitled to rulings as soon as you can get them, as soon as humanly possible.

Had I known my trial from next week was going to settle, I would have moved you there, so I would have had more time to look at this. But I didn't know that. So -- but, anyway, I noticed that. Okay. I noticed that.

With respect to the motion pending, I'm going to deny the motion as to the reopening of the 30(b)(6) deposition as of Datavast. My view of the arguments being made -- and I read the exhibits too, and I read the deposition testimony submitted -- is that defendants's argument is weak and an overreach that Datavast was a topic that was noticed for 30(b)(6) deposition.

This isn't an after-the-fact objection. The objection was raised by counsel at the deposition. The deponent said he

wasn't prepared on that. He was general counsel. And so, you know, he would have only been able to -- been required to testify with respect to what he was prepared on.

I don't buy the defendants's argument in particular that -- I have to find it. Hold on for a second.

(Brief interruption.)

THE COURT: Yeah. Defendants kind of shoehorn into. They say, well, our 30(b)(6) notice defined Authenticom to include any related companies, divisions or subsidiaries, which could include Datavast. Okay. I get that. That's not necessarily wrong. Or accelerated. And it included any efforts by Authenticom to secure or protect dealer data or any use of or agreements with third-party vendors to obtain data maintained on a CDK or Reynolds DMS.

I don't think we're talking about securing or protecting data really. And if that really was what you were talking about, that's a vague way of saying it for a 30(b)(6) topic. We're not really talking about obtaining data as much as distributing data from the -- that Authenticom got.

So I don't think you could shoehorn Datavast into the served topics. And if this is the best that defendants can do it -- on it, I think it falls short. I don't think it is worth reconvening a 30(b)(6) deposition to cover this topic with Authenticom's general counsel, particularly when that topic, I think, is being covered in other depositions.

I get why defendants want this information, and I get why it is important to their defense and their counterclaims, talking about Authenticom accessing their systems. But I think you're getting information on that. And I think, you know, again, in the overall theme of, we got to end this at some point, I think this falls on the end of, we should end it.

If that was on day one of discovery, maybe I would look at this differently. But it is not. And so I am going to deny the motion as to reconvening the deposition as to Datavast.

With respect to the polling client manager data, I have -- I have some questions for Authenticom here. I think your argument -- well, first of all, let me dispense with a couple of things and focus then on what needs to be focused on.

Timeliness. Overrule that objection. This issue has been on the table for some time. You have been chasing each other on this for a while. I read all the correspondence on this. I read the -- you know, what you were talking about. And I don't think this was put to bed. And I think, particularly with the most recent statement, which is that we can't even do this, it is impossible to do it, I just don't think this was tied down.

Is this late in the process? Yes. But you have been chasing each other around on this for a long time. And some of the delay, at least from what I can see, is Authenticom's

fault, not CDK's fault.

Would it have been best for CDK to not -- to tie this down, you know, back in October or November? Yes.

Did you do everything you could to help them tie it down? No.

So the timeliness document is not working for me.

The spoliation issue, not ripe right now. I'm not dealing with that. And that really doesn't come into play with respect to whether you should or shouldn't produce something.

But I'm having trouble figuring out exactly what exists. If something exists, my feeling is you have got to produce it. But I'm having -- you know, Authenticom really argued the strawman here, which is we can't produce a report, and we can't produce -- we shouldn't be required to create a document that doesn't exist. I agree with that. It is not clear to me that that's what the defendants are asking for here. It would be -- it sounds to me what the defendants are asking for is a snapshot of what appears essentially on a computer screen when somebody queries the database.

So they are not asking to prepare a report per se, they are asking for information that is resident within your system. So it -- you possess it. It is in your possession, custody or control. It is information in your system that is either a seven-day period or it is whatever you had in November of 2018. I think the -- it is not clear to me from

Authenticom's response here whether anything exists. Okay? Whether there -- but I have seen what you have produced to them as an example, which I think is exhibit -- I mean, it is quoted in full in the defendant -- the 18 lines are quoted in full in defendants's brief, but -- it's -- is it 16 or --

MR. HO: It is an attachment to Exhibit 11.

THE COURT: Right. Yeah, it is the last -- yeah. I mean, I see that but I am having trouble figuring out what exists and what is ephemeral or what's tangible.

And so I'm going to ask Authenticom at least to explain to me whether -- in particular whether what the defendants are asking for, which is the PCM log for the originally requested seven-day period in November 2018 or a log for the seven days between June 10th and June 16th, which I know is not necessarily within -- you know, before the lawsuit was filed. But I think what they are trying to do is see how does Authenticom's system interact with theirs or what kind of data do you get. I'm not 100 percent sure that I understand to what use they end up putting that. But I could see it being a really nice visual in front of a jury, so I can understand why they might want to see it.

But I'm just -- I'm trying to figure out what exists. And I will tell you that if I don't understand what you are saying, Mr. Nemelka or Mr. Ho, then I'm going to appoint a special master to figure out what the heck you should produce,

if anything. And you guys are going to split the costs of paying for it because if it is too complicated for me to understand, I'm not going to have days of it.

I might need to have a hearing. I might need to have an evidentiary hearing. I might need to put your computer guy on the stand. But I'm going to bring in a special master who I have appointed in other cases, Nora Grossman, who is an expert on e-discovery. And, frankly, when I have appointed her in the past -- I have actually never had to have an evidentiary hearing because she sits down with the parties, speaks the lawyer language because she's a lawyer, and also speaks technical language because she is a technician, and she figures out how the parties can resolve the issue. And I don't ever have to deal with it. But if I have to deal with it, I will.

But can you answer my question?

Or Mr. Ho.

MR. HO: I'm going to try, your Honor. I think there is two aspects to the question of what's available. Temporally my understanding is that what is available is information that goes back seven days. So seven days from today is information that is essentially overwritten. It rolls off after seven days. But it is -- the second aspect of the answer is, importantly, it is not in the database. It is not as if you can query -- type in a query or run a search over a set of data

and pull out from a database the information that's being sought.

This information is essentially imbedded in the software program itself. And that's why from a legal standpoint more than -- so than a technical one, we think that the rule that governs this is Rule 26(b)(2)(B), and that this clearly falls within the ambit of data that's not reasonably accessible without undue burden or cost. Because some computer programmer actually has to go into the software program and find for every dealer or -- and every day the data that they want. And so seven days doesn't sound like a lot, but when you're talking about hundreds and thousands of dealers, and you have to do it dealer by dealer for every day, as you see they have taken a snap -- the Exhibit 11 that was alluded to is one dealer for one day. So you'd have to do that many, many different times. And it is not something that can be done in an automated way.

As Mr. Clements's deposition -- declaration highlights, and this is Exhibit 1 to our opposition, this all has to be done manually by someone who actually -- a computer software person who will actually have to log in to the program. And we don't think that there is good cause to do that.

As we highlighted in our opposition brief, we think that this is exactly the kind of data that the Seventh Circuit

discovery program and the Sedona Conference and, you know, all the kind of leading authorities about ESI say are presumptively off limits because of the cost and burden involved. And we don't think that the defendants have made the kind of showing that you would need to overcome that.

In particular, with respect to relevance, as your Honor has already identified, it -- at best it seems like what the defendants are after is a sense of the kind of information that Authenticom keeps in this, again, very ephemeral way about the way in which its system accesses the DMS.

There is not going to be data that covers the relevant time period in this case. It is only seven days long. So at best it is going to be a demonstrative or illustrative set of data. And, frankly, given the limitations on relevance, we don't see how there could be good cause to over -- to justify the imposition of this kind of a burden.

We have, as we pointed out, offered to do somewhat more than the one day for one dealer that we have offered. And to the extent that a slightly broader sample or illustrative set could be useful, we have offered to do that.

But seven days for all dealers would be a monumental task for a company that has been, frankly, financially decimated by the defendants. We won't go into that again. But Authenticom is a small company, much smaller now than it was before, and simply doesn't have the resources to do this kind

of highly time-intensive project.

THE COURT: Okay. Couple of questions before I ask the defendants anything. I saw the statement in Mr. Clements's affidavit that Authenticom had to lay off two-thirds of their work force during litigation. So I -- you know, I'm not without appreciation of that.

A couple of questions. So what you're saying is that the 18 lines in Exhibit 11, that was obtained by a computer programmer going into one particular -- within a seven-day period -- one particular dealer's information on the software, taken a screenshot of that. But that would have to be -- if we took a seven-day period, then somebody would have to go through all of the software that ran during that period of time for all of Authenticom's customers and take those same essentially screenshots to comply with the defendants's request, right?

MR. HO: I will say I'm not a technical person, so I'm not sure screenshot is exactly the right terminology.

THE COURT: Okay. Or a printout.

MR. HO: But conceptually that's exactly right.

THE COURT: Okay. And how many, roughly, do you know? You said hundreds or thousands. There a difference between hundreds or thousands. We're talking about many dealers?

MR. HO: Over time I would --

MR. NEMELKA: I don't know exactly today. Authenticom used to service over 10,000 CDK and Reynolds dealers. It has

been drastically reduced. I think it is probably low thousands.

THE COURT: Okay. And I take it by your response to my question, CDK questions whether something exists in tangible form that had been preserved from November of 2018. Is that no longer -- is that not the case?

MR. HO: Your Honor, there were never reports or -- these ephemeral data were never preserved or reduced to a documentary form in the way that we would think you of it under Rule 34. With the exception of the one snapshot from December of 2018 that we have then produced to the defendants in March of 2019. So all we would be talking about, as far as I know, is the seven-day period rolling back from today.

THE COURT: Okay. I know they are going to have a -- they will have a field day on that particular point, but I'll listen to them.

Okay. So we're talking about -- really just talking about a seven-day period now as illustrative of what this would look like. And what you are telling me -- and I think I understand this without having a terribly substantial technical background -- what you are telling me is because this data resides in the software that Authenticom runs on a daily and hourly and minute-by-minute basis, in order to provide even a seven-day snapshot of this kind of polling data, CDK -- Authenticom would have to go into the software and physically

go in, query through that to find each transaction where you could find something that looks like those 18 lines that you produced in March of 2019, would have to replicate that for every dealer, who you had during that period of time, and what software was being run. And that's a very burdensome labor -- time intensive and costly process for a small company that's lost a lot of its employees, at least in its technical side.

The relevance of all that data for all the dealers is minimal in your view. But you are offering to do something that is much less burdensome. And I wasn't sure what -- that changed over time. It seemed to me in the discussions you had.

So what are you now offering to do for certain -- you mention 24 or something. I don't know what you're offering.

MR. HO: Ten CDK dealers and ten Reynolds data -- dealer rather.

MR. NEMELKA: Twenty.

MR. HO: So 20 total.

THE COURT: So you're offering to do what they're asking for.

MR. HO: For one day.

THE COURT: Okay. And who is arguing this for your side there?

Mr. MacDonald?

MR. MacDONALD: I am, your Honor.

THE COURT: Okay. So why is their offer not sufficient?

MR. MacDONALD: Well, as your Honor referenced, the polling client manager that contains information about what files Authenticom polls, how long it polled for, when it polled, how it polled. And Authenticom has told us they don't otherwise track this information.

So polling client manager is really the only source of instances -- of tracking instances Authenticom accesses defendants's DMSs. Now obviously there are illustrative reasons we want this that you mentioned. But also, as part of our counterclaims, and defendants have counterclaims under the Computer Fraud and Abuse Act, the Digital and Millennium Copyright Act, and various other federal and state claims, under those counterclaims defendants need to be able to show instances of wrongful Authenticom access. And Authenticom has said they don't otherwise track this access.

And one of the problems we have is that, as you read in the briefing, in the summer of 2018 Authenticom offered this alternative log that they would produce to us to try to satisfy us. And we took the deposition of Authenticom's 30(b)(6) witness in April of this year. And it was the deposition just -- this was a deposition just about data. And the first topic in that notice was solely this issue of that alternative

log they produced. And their witness testified that that was not -- this is a quote -- not an accurate representation of polling and that we couldn't rely on it for any of the purposes to try to -- tended to show DMS access.

So the data they have on DMS access is stored in their PCM log. They haven't retained it. They only have seven days. And now they say they can't export it. And the alternative data they gave us they say we can't rely on.

So if we don't get any better data -- and, again, this is seven days, so it is going to be hard from that to do extrapolation. It is not going to be great.

But if we don't get slightly better data, we are going to come in here in a few months, and they are going to have Daubert challenges against our expert saying, oh, you guys relied on bad data. We told you it was bad data, but we don't have anything else to rely on. So we're between a rock and a hard place on this issue.

Now on the technical issues, we agree, we acknowledge, we put to the side the spoliation issues. There are only seven days of data. It is in a log. That's what their documents -- that's what their witnesses say. It is kept on their system. The witnesses said, you can log in, you can look at this log. Whether you have to click on individual dealers or not, I'm not sure. But somebody could log in and look at the last seven days of polls right now.

Now we're willing to accept this in multiple forms if it can be copy and pasted into a document, and we can do that. Your Honor mentioned screenshots. We would accept it in the form of screenshots that can be OCRd.

You know, if the manual difficulty of screenshots is too high, and they want to set up a terminal for one of our experts on the AEO basis to go in and manually create the log themselves, we can do that. If it is easier to have a special master do it, we can do that. Or we're open to alternative solutions that would lessen the burden. But this is the only place they store the data. That is what they have told us. And this is data that we need.

THE COURT: Okay. I don't think I need a special master here, thank God. And thankfully for you -- although her rates are not outrageous. But I don't think I need a special master here to understand this. I either underestimated myself or overestimated the complexity of the issue that you have here.

I -- from -- based on what I can read in the documents, I think -- or in your briefs, I think -- and based on what I saw in some of the deposition transcripts, the parts that you did submit to me -- and I think you were -- were you talking about Dane Brown's deposition?

MR. MacDONALD: No, this is Joe Noth's deposition.

THE COURT: Okay. Yeah, okay. That's -- you also

submitted that too, I think.

I think you are -- defendants are developing information that potentially they could use to support their theory of unauthorized access to your system. You describe some of that information at pages 2 and 3 of your brief on this issue, which the sealed portion of it is ECF 711.

Plaintiffs take you to task for saying, well, why are they saying all this stuff? They're just trying to dirty us up. True.

But it also to me illustrates the type of discovery you're developing. And while I understand your issue of Daubert, you know, I don't know how that ends up coming out at trial if the other side didn't produce or said I couldn't produce the information, but they did give you a sampling. That's beyond my pay grade, at least at this point, to decide. But I do think you're entitled to some information on this topic.

I agree with the plaintiffs that the burden on a small or shrinking company of going through the so-called ephemeral data to find this for hundreds, if not more, customers or even, frankly, many, many tens of customers is burdensome and not proportional to the needs of the case. I think the proposal of ten CDK dealers and ten Reynolds dealers for one day during this period of time will provide the defendants with -- and I don't care if it is a screenshot or however it is. I mean, I

am not going to micromanage that process.

But the information to show the polling data for those CDK and Reynolds dealers, as best as I can determine what you're -- again, the relevance of this information is not that it is the recipe for Coke, it is for you to illustrate that this happens. And yet another way, in addition to what you have already illustrated, and I'm -- I can't really, based on the testimony that you're getting, I can't see how this is not adequate for the purpose that you need it for. What I do know is that requiring lots more is not proportional to the needs of the case.

And, again, we're talking about one day in 2019, I think. We're not talking about prior time. But probably the information is still helpful to you.

But I -- so, in substance, I think the information that you're looking for has some relevance. The burden on CDK -- on Authenticom of producing a complete seven-day set of information -- of this information, I'm convinced is unduly burdensome and not proportional to the needs of the case from what I understand the information will show and how it will be used.

I do think that the proposal of ten CDK and ten Reynolds dealers is much more proportional to the needs of the case and will provide the defendants with some of the information they're getting, at least on an exemplar basis.

And my understanding really of what the defendants want is an exemplar basis because whether it is a full seven days or it is one day, you're looking -- you're not going to get the entire history of the polling data, you're only going to get a sample. So the only question really is how large the sample should be. And, I mean, I don't know if ten is right or 12 is right or whatever. But I think that's within the realm.

Hold on for one second.

(Brief interruption.)

THE COURT: I'm thinking something. Hold on.

(Brief interruption.)

THE COURT: I take it, Mr. Ho, that the burden on Authenticom really is in the process of querying the software to get the information. So hypothetically if you did, you know, ten exemplars for CDK dealers and Reynolds for day one, and then for day three you did ten different dealers, they would get 20 dealers for CDK and 20 for Reynolds on different days -- that would double your burden in the sense that you have to look at two days.

Well, hold your answer to that for a second.

Mr. MacDonald.

MR. MacDONALD: Yes, your Honor, I --

THE COURT: Is your objection -- is your objection to -- I mean, here's my problem with your argument. You're not getting a statistically significant sample in my view under any

scenario for the entire time period that this occurred. Whether they give you seven days, whether they give you a rolling seven days or not, that's not a statistically significant sample, I think. I mean, you know, I'm beyond my pay grade on that too.

But what you are getting is an exemplar. And the only question is how large that exemplar should be. So why is an exemplar that shows ten CDK and ten Reynolds dealers on one day, why is that materially less helpful to you, for example, than seven days?

MR. MacDONALD: Well, your Honor, I'm not a statistician either, but my understanding is the larger the sample we can get, the -- you know, anything that we do here, since Authenticom doesn't really track or keep this information, is going to be an attempted extrapolation. There is going to be some uncertainty there.

But a larger sample will give us slightly more comfort in doing that sort of extrapolation to see kind of what they are doing on a systemic basis, how often they are accessing our systems, how often they are polling for certain types of files, how often they are running certain types of scripts or running circumvention on our security. So the larger the sample, the better off -- the better data we would have.

And I also wanted to say, to the extent that we're limited to 20 CDK dealers or, you know, ten CDK and ten

Reynolds dealers, however it is, defendants will request that we get to pick the dealers that are used.

THE COURT: Okay. I know you're not a statistician, but I don't buy your argument because what your argument really sounds like is an exemplar argument. I mean, and you have got testimony from Authenticom -- and I can't remember which deposition it was in, but I read it. Maybe it is Noth -- that Authenticom queried the system for hundreds of people -- of dealers, I think. I mean, you have got that testimony, right?

MR. MacDONALD: But the issue, your Honor, is that under some of the statutory claims that we have brought, the Digital Millennium Copyright Act, each instance, each query is its own statutory violation. So we need to be able to quantify how many times they have queried our systems. Authenticom has not produced very good data on that, so we're trying to extrapolate it from a variety of sources. And this would be one of our sources.

And, obviously, you know, a seven-day period in June 2019 is not the ideal data set, but it is better than nothing. And it is better than just having kind of a limited set of dealers.

THE COURT: Yeah, I mean, I think -- I'm not sure how much better than this snapshot is proportional to the needs of the case. Let me just look here for a second at what you said in your briefs. Your brief.

(Brief interruption.)

THE COURT: Yeah, I mean, my guess from what -- you know, I mean, I know plaintiffs say you gave me this information to prejudice them. I don't know, not really. But you're trying to give me a picture of why the polling data is important because you have already established wholesale -- in your view wholesale access to the CDK system. So one of your bullet points on page 3 says, Authenticom had CDK dealers install a program called Profile Manager and used a system administrator-level account to automatically re-enable DMS log-in credentials that Authenticom was using to extract data from CDK's DMS within minutes after CDK's security measures disabled them. And you cite the 30(b)(6) deposition of Brown, right?

MR. MacDONALD: Yes.

THE COURT: And that's really what we're talking about here, right?

MR. MacDONALD: Well, that's --

THE COURT: To some extent.

MR. MacDONALD: Well, seeing the actual scripts run is to some extent also trying to quantify it.

THE COURT: Right. But you're never going to get all the scripts that were run. Instead you are going to testimony that says this happened a lot, and here's an example of what it looked like in June of 2019.

But you're never going to get, I don't think, today,

from data that disappears, what happened prior to that date. So even if I were to give you seven days from today, yes, you could argue that you could extrapolate that. Everything else is arbitrary in terms -- and I still haven't -- I mean, given that it -- what you're asking for, I think, is illustrative, I'm not sure how a larger sample, other than it is just a bigger illustrative set, gets you anyplace.

I mean, how are you going to use this -- you say you are going to give this to your experts, but your expert is not here. Or you tell me you're not a statistician. I think Authenticom would have an interesting time with an expert who says, based upon a seven-day sample in June 2019, this is how often I think this happened for a four- or five-year period.

MR. ROSS: Your Honor, just to chime in briefly. This is Brian Ross.

Before -- part of the problem is that we don't know what the numbers are for these most recent seven days. But one of the things that we would hope to do would be to establish a bare minimum, a conservative estimate that our experts can apply. If you see a similar number of instances over June -- a certain week in June 2019, and you combine that with testimony where Authenticom is saying, we have lost customers, and we are accessing your systems much less often nowadays than we were back in the 2015 to 2017 period, then we would hope to establish a floor in terms of quantifying these improper

instances of access. So that would be one example.

Would that be ideal? Of course not, but it would be a -- certainly better than what we have to work with now on core elements of our claims.

THE COURT: Yeah. And you all say you want to identify the dealers. So do you -- is part of your proposal -- I'm not going to give you a seven-day look at hundreds of transactions. I'm just not. That's unduly burdensome, it seems to me. And I don't think it is proportional to the needs of the case, as I understand what this is going to be used for, even if it is a better sample for you for your expert. Because although I don't have hard data from Authenticom on this, I have the Clements's affidavit. And his affidavit at some level convinces me that this is a labor intensive exercise for a company that may not have the folks to do it. And it has got to be expensive. And it has got to be real expensive.

Unless you want to pay for them to go through there and reimburse them for the costs of doing this.

So I'm not going to give you seven days.

You hesitate. You'll pay for it?

MR. MacDONALD: Depending on the cost, we would consider it, yes. Or, you know, as I said earlier, we're willing to have an expert do it if they will give us a terminal and --

THE COURT: I doubt that's happening.

Right, Mr. Nemelka -- Mr. Ho?

MR. HO: We would certainly object to that, your Honor.

THE COURT: Yeah.

I mean, we're talking -- at a -- conservatively we're talking about hundreds of dealers through this period of time. Or at least a substantial number of more than ten.

I mean, another way to cut this is ten that you could identify for the seven-day period. I mean, I'm not sure how much incremental burden that imposes on Authenticom. Ten dealers a day for seven days.

Or ten CDK, ten Reynolds for seven days.

MR. NEMELKA: We'll multiply the effort by seven.

MR. HO: And, your Honor, if I could just make one observation about --

THE COURT: How long -- do you know -- yeah, you can in a second.

MR. HO: Sure.

THE COURT: Do you know just, because the party that is raising the burden usually has to quantify the burden. Do you know for Mr. Clements's -- let's me see. I'll look at Clements's affidavit. Hold on.

(Brief interruption.)

THE COURT: Yeah, see, he talks about a -- he is talking about the strawman here. Rewriting the software to be

able to get a -- yeah, I'm getting to the point where maybe I -- well, if --

(Discussion off the record.)

THE COURT: Right. I mean, do you have any idea as you sit here today how much time it would take for ten CDK dealers and ten Reynolds dealers? I mean, because you're making that proposal, you must have talked to somebody technically to find out how -- and then you just multiply it by seven. So how much time is that? Time and expense.

MR. NEMELKA: They didn't give me a specific time. They told me it would take about a week to get it to me because I wanted to know about timing if this -- if this is something that was offered or accepted. So they said it would take them about a week. I don't know how they divided up their -- they only have about three or four people now in their development, and so I don't know how they would divide up -- how that divides up man hours.

MR. HO: But --

MS. MILLER: Your Honor, this is Britt Miller. And I don't purport to have had a sneak peek at Authenticom software so as to say how it operates. But drawing on my limited computer science background, I would think that you could -- if you had identified the same ten dealers and you write the script to be able to query the system for those ten CDK dealers and those ten Reynolds dealers, you could run that query as and

against seven of the days and return the results. I.e., you wouldn't have to rewrite the program or rewrite the poll or rewrite the query because it is the same query, just changing the date.

THE COURT: I would bet they are not talking about writing a query, I would bet that they are talking about manually going into the system and locating the stuff. Because Clements talks about the burden on actually writing a program to do this.

Am I right?

MR. HO: Yes, your Honor.

THE COURT: Yeah. I think what they are talking about is putting somebody in front of a computer screen and looking at this, you know what, the seven-day period, and extracting from the software database this information. And, again, this is without prejudice to their argument that the, you know, courts have said this, quote unquote, ephemeral data that shouldn't have to be produced anyway. It is kind of like just scrolling stuff.

Right, Mr. Ho?

MR. HO: Yes, your Honor. I think of it as sort of -- it as sort of footprints in the sand. I mean, they are only there for seven days, and then they are washed away as in the ordinary operation of the software program. And that's exactly the kind of data that we ordinarily think of as too burdensome

to have to preserve, maintain, and then produce in discovery. And we think that that ordinary principle ought to apply here.

If I could just make one observation about your Honor's point that I think is well taken, that this can only be for illustrative purposes. I mean, I'm not a statistician, but a red flag, you know, is raised in my mind when I hear the defendant saying, well, actually we'd like to pick the dealers because a central principle of any kind of extrapolation is that it be from a statistically random sample. So they are skewing the sample by their very request to decide which dealers to choose, which leads me to think this really isn't about experts or about extrapolation, it is, as your Honor suggested, about trying to find as many illustrations as possible that they can use, however they intend to, in front of the jury.

THE COURT: Yeah, I mean, I do think it is trial presentation. At least that's my gut here. I don't think you're -- you know, Mr. McDonald's -- I mean, Mr. Ross's ears perking up and saying, well, we'll pay for it, we'll pay for it. We'll put an expert there. We'll find all this stuff.

I still kind of envision, which hopefully they are not going to be in front of me, the Daubert arguments about whether -- what information in June of 2019 has to do with something else.

But I suppose defendants would argue, since the

company is smaller and retrenched somewhat, it can only be worse earlier on in the period.

MR. ROSS: And just to be clear, your Honor, one point of clarification. Mr. Ho has mentioned this concept of who is picking the dealers. Obviously the statistical significance of this data is precisely why we wanted to get a production of a full day or days, irrespective of anybody picking dealers. But in a world where we are -- we understand the Court's comments. And in a world where we are going to be limited to a limited subset of dealers, that's why we would like at least the flexibility to choose. And if -- if we decide to choose them in a randomly generated way, we'll do that. But the -- ultimately that was why we thought we shouldn't be limited on the number of dealers.

THE COURT: Well, and to say it differently, you don't want them to pick them. You would rather -- if somebody is going to pick, you would rather pick.

What -- do you know, Mr. Nemelka, what's the over and under? What's the difference on whether I were to say, for example, all the polling data for one day between June whatever and whatever versus ten CDK dealers for one day? I guess depending upon how many dealers you're running, it could be hundreds as opposed to ten, right?

MR. NEMELKA: Yeah, it's -- that's just very burdensome. It is the seven dealers -- excuse me -- the 20

dealers over seven days is much less burdensome than doing all of one day by an order of magnitude.

THE COURT: So might I assume if it takes one week for ten and ten, it would take two weeks for 20 and 20, right? Or it would take two weeks for ten and ten over two days, right? Probably, right?

MR. NEMELKA: Probably, that's right.

MR. HO: And, your Honor, more than just the number of hours, this is a company that is on a -- you know, trying to run a business at the same time and has been reduced to the absolute bare number of people -- minimum number of people that is required to continue to operate its business. So to take one of those people and say, you have got to spend a week or two weeks trying to find data for these, even, 20 CDK and Reynolds customers is still a very significant burden on management.

MS. GULLEY: Your Honor?

THE COURT: Yes, Ms. Gulley.

MS. GULLEY: Thank you. Sorry. I wasn't sure whether there was a window. I was waiting for a window. Can I make some comment for -- momentarily?

THE COURT: Sure. Now we will have a one, two, three, three lawyers arguing for Reynolds and Reynolds.

MS. GULLEY: I'm so sorry, your Honor.

THE COURT: That's okay. We have got two for CDK, so

we have got the whole family in here.

MS. GULLEY: Okay. Well, thank you.

So I just want to address a couple of issues that you raised. First of all, I appreciate that you are not addressing the spoliation issue today. Obviously there are bigger issues. There are prima facie elements that the defendants say in having to prove their counterclaims, you know, that where we sent them hold orders long, long ago and have asked for the type of data for a long time, which we're just learning the data that we got wasn't good enough.

With respect to the burdens, we understand, you know, that this employee situation with the reduced forces that plaintiffs put in their recent motions has been something that they have been putting in their motions since this case was in front of the Seventh Circuit, and after which Mr. Cottrell made his statement to the press that the company was well positioned and battled. That came after those layoffs when he made that statement. We have talked about this many times.

Nevertheless, we appreciate the burdens of this. Reynolds and CDK have also had significant burdens. In polling the transactional data that the plaintiffs requested, Reynolds has to essentially shut down its accounting system every night for months to pull that, and to had to pay tens of thousands of dollars to buy additional server space.

So as an order of magnitude, we're talking about two

weeks for them. We have worked on this for months and months and months because it goes to elements of the plaintiffs's case, we have had to do that. This goes to a core element of the defendants's case.

I understand that now, given that the plaintiffs have continued to delete that information on an ongoing basis since the case began, we only have seven days, but seven days is better than zero days.

THE COURT: Okay. I hear you.

(Brief interruption.)

THE COURT: You know, there is nothing in -- I'm re-reading the defendants's brief on this, which is sealed as ECF 711. And really the whole import of what defendants are arguing there is the illustrative purpose of this data rather than, you know, a huge -- I'm interpreting it as more of a -- I don't know how this gets you -- there is no affidavit from an expert that says, I need seven days of data, for example, for X number of Y dealers.

What you say at page 7 is the PCM log, which is ephemeral data, I'm convinced, even though it would only contain data for a limited time period, may be the only means through which defendants can understand Authenticom's polling activities on a poll-by-poll dealer-by-dealer basis. So it is an attempt to understand kind of what's going on. Maybe I'm putting too much weight in that.

Okay. I want to take a really quick break here. We have been going since 9:30. I know I have an 11:15 criminal hearing, which everybody has not yet arrived for. My intention is to end you there.

Was there anything else you wanted me to deal with -- I understand -- I guess there is -- there are a couple of things that I would like to deal with with you. I want to make sure I know when the documents are going to be produced. I want to know of the remaining things under advisement what your priorities are.

MS. MILLER: All of that -- your Honor, this is Britt Miller. I'll let Mr. Provance speak as to when we can get the documents to you.

As to other matters that remain under advisement, Docket 539 and Docket 543, which are defendants's motions to compel production, they were both listed on the May 15th status hearing report --

THE COURT: Uh-huh.

MS. MILLER: -- which actually implicate a number of issues that your Honor ruled on with respect to CDK today.

THE COURT: Well, isn't 539 your motion to compel Authenticom, which gets taken care of by what I am doing here or is this more in --

MS. MILLER: No, this is a -- this is the motion to compel Authenticom to produce communications off of their log.

THE COURT: Okay.

MS. MILLER: So these are specifically as to the documents that they have claimed privilege to.

THE COURT: Okay.

MS. MILLER: Same thing is true of 543 --

THE COURT: Got it.

MS. MILLER: -- which is as to Auto Loop and Cox Automotive. Again, we have asked for both of them either to produce them or to put them for in camera review.

So to the extent your Honor is going to plan a hearing, you might want to do it all at once.

THE COURT: I don't think I am going to -- I don't want that kind of punishment.

MS. MILLER: Fair enough. Fair enough.

So those are the other -- so in terms of primacy, I would -- considering the crossover, I would suspect that those two would be ones we would be looking for for rulings in the relative short term.

THE COURT: Okay. And for those you would say I would want the opposing party to send me the document -- I don't have those documents in camera either, right?

MR. NEMELKA: Correct.

MS. MILLER: Correct.

(Discussion off the record.)

THE COURT: Something we received as zip file

documents on. Do you know which one that was?

MS. MILLER: That may have been the last round of in cameras with respect to the class plaintiffs's motions that you have already ruled on.

THE COURT: Okay.

MS. MILLER: So I don't believe we have submitted -- either side has submitted the actual documents with respect to these three motions.

MR. PROVANCE: Your Honor, it is hard for us to know for certain, but those may have been submitted in connection with Docket 633, which is a separate motion to compel.

THE COURT: Yeah, the clawback documents and FTC privilege, right?

MS. MILLER: Correct.

THE COURT: And then in addition to those, I have got -- I had this issue about briefs for refreshing data. Has that been taken care of? You don't have to do that?

MS. MILLER: There are a number of things that are outstanding from the May 15th status. We have produced -- a number of people have produced their refresh data. A number of portions of that refresh are still outstanding as to certain parties. There are agreed dates by which folks expect to produce that data. But there may be issues following those refreshes which may need to be produced or may need to be addressed with your Honor.

There are also a handful of other items from the May 15th agenda, not motions, but issues that were raised that the parties are still working through. But if those are not resolved, obviously, we will have to bring those to your Honor as well.

THE COURT: Okay. Mr. Provance, what's your thought on when you can get me the documents in camera?

MR. PROVANCE: Your Honor, the short answer is that I I will need to talk to my staff as well as probably our discovery vendor. But in general we'll move with all alacrity.

One --

THE COURT: All deliberate speed.

Why don't you, plaintiffs, also talk to Mr. Provance about when you can get me something with respect to what I would need to look at with the -- off of log issues that you have raised.

MR. NEMELKA: On the corollary issue?

THE COURT: Yeah.

MR. NEMELKA: Yes.

MR. PROVANCE: Okay. Your Honor, if I have could just --

THE COURT: And send an email to Brenda as to when you can do it. I'll enter an order.

MR. PROVANCE: If I could ask one question. One thing that we have learned in the process with your Honor is that

submitting documents in camera that were produced with redactions are often difficult for the Court to understand. We could undertake an effort to identify documents that were redacted, but then, you know, try some way to identify what we have redacted, but make it so that you could still see it. We can explore those things. But obviously it will take a little bit longer to put those together.

THE COURT: Yeah. I mean, obviously, I'm going to want to know what was redacted. I don't know if it is a problem just with me or with other judges. But I am going to want to know what's redacted in order to understand it. It may be highlighting it or something, I don't know. But I -- that's part of the process.

MR. PROVANCE: That's certainly an understandable request, and we'll build that in to our estimate of how quickly we can get you the documents.

MS. WEDGWORTH: Your Honor, if I may bring up, I think ECF 294 and 308, going way back to July, August of 2018, we had a motion where you ruled on the waiver part, but you didn't rule on the underlying privilege part of those clawback documents with the CDK production there, which got rolled into the current clawback motions.

So when you do rule on the clawback motions, with regard to CDK 294 and 308, which I think consist of roughly 1400 documents, still need to review for privilege.

And that I think rolls into the Docket 633, which we -- which we have been discussing.

MR. PROVANCE: Your Honor, this is Matt Provance. I'm not sure I agree with what Ms. Wedgworth just explained. There were a set of clawback motions filed last year. Your Honor did rule on the waiver portion.

As to substantive questions about whether those documents were in fact privileged on a document-by-document basis, your Honor instructed the parties to incorporate that into broader challenges, because those clawback documents were logged and part of defendants's privilege logs. And if there are challenges to those documents based on their privilege log entries, they could have, should have, and I believe were raised in connection with the parties's discussions about privilege logs that took place in November of last year.

And so from the Court's perspective we believe the motions that were teed up, the documents that were challenged, the privilege log entries that were challenged, they incorporate all of that.

THE COURT: I think I agree with that. I mean, as I recall this was a kitchen sink 1400 documents. I didn't have a document-by-document challenge. And I think I said something after I dealt with the waiver issue that if the parties really want to do this on document-by-document basis, you have got to tee it up to me on a document-by-document basis. And my

thought was that that's what was done with ECF 633.

I don't think -- if I am correct, and the 1400 documents from before was a kitchen sink basis -- and I'll go back and look at that, but I am not interested -- I don't think it was a -- I don't think I -- I think what I said at the time was I can't rule on this on a kitchen sink basis.

Isn't that right, Ms. Wedgworth?

MS. WEDGWORTH: I thought this was the one where you requested and received a sampling of those documents.

THE COURT: Yeah.

MS. WEDGWORTH: And when you looked at those, there was this issue about the redactions weren't in the documents, which delayed everything. So I thought we were still dealing with the issue of how the redactions work with the sampling you got.

To the extent they are rolled up into 633, we certainly want everything ruled on at one point. I don't think we have set aside the 1400, but they are included in the 633. And, nonetheless, the 294 and 308 on the docket are still open for that -- for the privilege.

THE COURT: How am I supposed to rule on the issues of privilege on a sample basis, without knowing whether the sample you gave me actually is really an exemplar for each and every other document, and without some writing on that? I mean, how -- I mean, I remember you gave me some samples or I asked for

some exemplars. I think I asked for a hundred or something like that. And I had them in a box. And when I went through them, it didn't help me at all, so --

MS. WEDGWORTH: I appreciate that question and appreciate the answer is normally document by document. In my experience in other cases, and I thought maybe this is where you were going when you requested the sample, many times magistrates or judges rules -- rule on those sampling saying, here is a scenario where this is in or out. And then the attorneys take that ruling and apply it to the rest of the documents.

In this scenario, the Judge has already ruled that this is coming in for whatever reason or this is -- this remains on the privilege log. And we will follow that example in going through. And that has worked in the past, and I -- I didn't try to read into too much what you were doing with the sampling.

But with the ruling from that sampling, we certainly could adjust and figure out the rest of the production with the understanding there are usually some documents that do not cleanly fall into one of your previous rulings.

But, again, the issue that happened in one of the hearings was when defense counsel produced that sampling, the redactions didn't appear, it threw off the review of it, and we left it at that.

MR. PROVANCE: Your Honor, I won't belabor the point because we have a full record on this. We had prior hearings. We can all go back and check what was said.

There have now been four motions to either clawback or seek production of privileged documents against CDK. Ms. Wedgworth on behalf of the dealers filed motions seeking all certain categories of privileged documents that were initially produced to the FTC but then clawed back.

But all those documents have now been logged. And they were logged before plaintiffs filed not only Docket 633, but also their general omnibus motion challenging clawback entries at Docket Number 535.

So in terms of specific documents, there has been a full opportunity to challenge entries, challenge individual documents. And indeed the dealership class members and now the individual plaintiffs as well have made many, many challenges. And we have responded to them, and those issues are now fully briefed.

MS. WEDGWORTH: My -- a brief response, your Honor. I appreciate we're dragging this out. I'm not clear in that response that that 1400 -- those 1400 documents have been logged.

Mr. Provance, are you representing they have been?

MR. PROVANCE: So, first of all, I believe it is 2400 documents that were initially challenged by clawbacking. And,

yes, all those documents were either logged in connection with the initial clawback motion that the plaintiffs filed last summer in 2018 or were produced or have been included on the privilege logs that CDK has now provided across its entire productions.

THE COURT: Okay. We're going to probably have to leave it there right this minute. I'm going to want you, given that I have another hearing that has to start, and our defendant is here -- I'd like you to jointly email Brenda a date by which you're going to submit the in camera documents that we talked about.

I'm taking under advisement this issue of the polling data so I could think about it and decide which way I want to go or whether I want to call you back in or whether I need an evidentiary hearing on it.

How far do defendants want to push the issue? Do you want to bring in your experts? I mean, is the primary basis to get data for your experts or to get information that is -- that you can as exemplar or illustration? So, for example, if I say, you know, the amount of burden that I'm going to put Authenticom through is related to how deeply important this information is to the defendants, do you want to bring in your experts to testify about why they need this information and how a seven-day sample from 2019 is going to be the be all or end all of their analysis? Do you want to have that?

And then do you want me to appoint the special master so you can pay that special master to do this and go off and go on that track? Or do you want to accept some measure, ten or 20 of these over a day or two days, and take that for your purposes?

I just -- I'm trying to gauge how important this issue is in the grand scheme of things. How much time I should spend on it. How much time you want to spend on it.

MR. MacDONALD: Your Honor, we think this issue is very important. We want it for two reasons. One is the illustrative reason you talked about. One is, as I said, one of the elements of our claims is quantifying the number of times they run scripts on our system. And this is one of the, if not the only, source of that information.

THE COURT: So you have other sources of information.

MR. MacDONALD: There --

THE COURT: It is obvious from what you have got here. And so why didn't you, in your motion, wax eloquent on the quantification aspect as opposed to the illustrative aspect?

I mean, getting this information from a lot of different ways. You have got Authenticom people testifying about how the fact that they did this on hundreds of occasions. You have got your own systems that can show who -- probably how many times you were hit. You have got other data coming in.

So is this another pebble of information? Is it a

boulder? Is it outcome determinative?

MR. MacDONALD: I don't believe --

THE COURT: Or don't you know?

MR. MacDONALD: I don't believe it is outcome determinative. But it is a substantial source of information. This is the best information Authenticom keeps on this.

THE COURT: It may be the best information that Authenticom keeps on it, but do you have other information that you can prove your case with?

MR. MacDONALD: Well, we're going to -- if we don't get this information, we're going to have to prove it with other information. But they are going to challenge that as not reliable. They are going to say your information isn't good enough because you don't have access to the instance-by-instance data, which is only kept on the --

THE COURT: Yeah, but they are going to challenge that on a seven-day sample too, right?

MR. MacDONALD: That's true. But then we have another pillar to stand on.

THE COURT: Okay. So we're talking about how many pillars you need to stand on, right?

MR. MacDONALD: Well, you need at least three or four for a chair.

THE COURT: Okay. A question whether a pedestal is enough here.

Okay. We're going to -- we're going to stop right now. I think I understand where we are.

I know I have to set another date to see you. I have other motions under advisement.

I think by and large the motions I now continue to have under advisement, pending what you're going to tell me about whether you work out everything on the issues in the agenda, including depositions and stuff like that, are -- motions mostly are in camera review, redaction, clawback kind of issues, which are terribly labor intensive. So we would have to set out some time for that.

But right now I think, unless there is anything else somebody wants to raise quickly, I think we are going to break.

MS. WEDGWORTH: Your Honor, just one brief thing. We have a third-party motion to compel that we briefed in the Southern District of New York, which was transferred here on May 30th. It was assigned to Judge Tharp. So we will be -- good news, bad news -- getting it to you, hopefully, this week. So there is a pending motion to compel from a third-party production.

THE COURT: Well, that depends on whether Judge Tharp wants to send it over here.

MS. WEDGWORTH: Correct, your Honor.

THE COURT: I think maybe it should go to Dow and then to me. I don't know.

MS. WEDGWORTH: I suspect we have to get it in front of Dow and then to you.

THE COURT: Well, it is not yet on my brief motions calendar, so -- okay. Can we break?

MR. NEMELKA: We thank you for your time.

MS. WEDGWORTH: Thank you, your Honor.

MR. HO: Thank you, your Honor.

MS. GULLEY: Thank you, your Honor.

(Which concluded the proceedings:)

CERTIFICATE

I HEREBY CERTIFY that the foregoing is a true, correct and complete transcript of the proceedings had at the hearing of the aforementioned cause on the day and date hereof.

/s/ Pamela S. Warren June 10, 2019
Official Court Reporter Date
United States District Court
Northern District of Illinois
Eastern Division